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Senate Bill _____
By _____

House No. HB1745
By Head

AN ACT relative to environmental audits.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. It is the intent and purpose of the state of Tennessee to encourage owners and operators of facilities and persons conducting other activities regulated under Tennessee environmental laws, or the regional, federal or local counterpart or extension of such laws, to conduct voluntary internal environmental audits of their compliance programs or management systems, and to assess compliance with such statutes, thus furthering the protection and enhancement of the environment and general public welfare of the State of Tennessee. In order to promote this public policy and intent, an environmental audit privilege is established and recognized.

SECTION 2. As used in this chapter, unless the context clearly indicates otherwise:

() "Environmental audit" means a voluntary, internal evaluation or review of one or more facilities, or an activity at one or more facilities to identify issues relative to environmental compliance status and strategies, regulated by Tennessee environmental laws or permits, or the federal, regional or local counterpart or extension of such laws, or of compliance programs or

management systems related to such facility or activity. An environmental audit may be conducted by the owner or operator, by the owner's or operator's officers, agents or employees, or by independent contractors.

() "Environmental audit report" means any documents, existing either individually or as a compilation, prepared in connection with an environmental audit. An environmental audit report may include, but is not limited to, field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically-recorded information, implementation plans identifying issues and strategies for corrective action, maps, charts, graphs and surveys, provided such supporting information is collected or developed in the course of an environmental audit. The following shall not be considered to be an environmental audit report for the purposes of this act;

(1) Documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency pursuant to Tennessee environmental laws, or other federal, state or local law, ordinance, regulation, or order;

(2) Information obtained solely by observation, sampling or monitoring by any regulatory agency;

(3) Information, not otherwise privileged, obtained from a source independent of the environmental audit.

() "Tennessee criminal environmental laws" means Tennessee Code Annotated, §§ 39-14-408, 68-201-112(a), 68-211-114, 68-212-114, 68-212-213, 68-215-120, 68- 221-713(f), or 69-3-115(b).

() "Tennessee environmental laws" means, collectively, all the provisions of the Tennessee Water Quality Control Act, Tennessee Code Annotated § 9-3-101, et seq., the Tennessee Safe Drinking Water Act, Tennessee Code Annotated § 68-221-701, et seq., the Tennessee Air Quality Act, Tennessee Code Annotated § 68-201-101, et seq., the Tennessee

Solid Waste Management Act of 1991, Tennessee Code Annotated § 68-211-801, et seq., the Tennessee Hazardous Waste Management Act of 1977, Tennessee Code Annotated § 68-212-101, et seq., the Tennessee Solid Waste Disposal Act, Tennessee Code Annotated § 68-211-101, et seq., the Tennessee Hazardous Waste Management Act of 1983, Tennessee Code Annotated § 68-212-201, et seq., the Tennessee Hazardous Waste Reduction Act of 1990, Tennessee Code Annotated 68-212-301, et seq., the Tennessee Underground Storage Tank Act, Tennessee Code Annotated § 68-215-101, et seq., the Tennessee Sanitary Landfills Areas Act, Tennessee Code Annotated § 68-213-101, et seq., the Tennessee Insecticide, Fungicide, and Rodenticide Act, Tennessee Code Annotated § 43-8-101, et seq., the Aerial Application of Pesticides, Tennessee Code Annotated § 43-8-301, et seq., the Tennessee Application of Pesticides Act of 1978, Tennessee Code Annotated § 62-21-101, et seq., and rules issued pursuant to these acts.

SECTION 3. An environmental audit report or any information derived from an environmental audit report shall be privileged, shall be immune from discovery and shall not be admissible as evidence or otherwise in any legal action in any civil, criminal or administrative proceeding, except as provided in Sections 4, 5 and 7 of this act. The privilege provided in the act shall be effective to prevent discovery of or to prevent use as evidence, any environmental audit report or information derived from any environmental audit report by any person, legal entity, the State of Tennessee or any government entity created under Tennessee law. This privilege shall be incorporated into the law applicable to privilege in Tennessee.

SECTION 4.

(a) The privilege described in Section 3 of this act does not apply if it is waived as described in this section by the person who is the owner or operator of a facility at which an environmental audit was conducted. Waiver of the privilege occurs if:

(1) The environmental audit report, or any part of it, is intentionally disclosed by authority of the party requesting the preparation of the environmental audit report to another person or

entity, other than an employee or agent of the owner or operator, not bound to maintain it in confidence, or for disclosure required as a part of self-reporting as outlined in Section 7 of this act; or

(2) The environmental audit report, or any part of it, is produced with authorization of the party requesting the preparation of the environmental audit report in response to a subpoena or in a discovery proceeding without objection or assertion of the privilege; or

(3) The environmental audit report, or any part of it, is fraudulently used by a person:

(A) To avoid criminal prosecution, or

(B) To contest criminal and civil liability, or

(C) To mitigate criminal sentencing and penalties.

(b) If the privilege is waived pursuant to this act as to only a part or parts of the environmental audit report, such waiver shall apply only to that part or those parts and not to the entire report.

SECTION 5.

(a) In a civil or administrative proceeding, a court of record, after an in camera review and hearing consistent with the Tennessee Rules of Civil Procedure, may require disclosure of material for which the privilege provided in this act is asserted, only if the court determines that disclosure of the environmental audit report was sought after the effective date of this act, and:

(1) The privilege is asserted for a fraudulent purpose; or

(2) Even if subject to the privilege provided in this act:

(A) the material shows evidence of noncompliance with Tennessee environmental laws, or with the federal, regional or local counterpart or extension of such laws; and

(B) the owner or operator of the facility has not promptly initiated appropriate actions to achieve compliance with such laws or to complete any necessary permit application; and

(C) as a result, the owner or operator of the facility did not or will not achieve compliance with the Tennessee environmental laws or with the federal, regional or local counterpart or

extension of such laws, or complete the necessary permit application within a reasonable amount of time.

For purposes of this subdivision (2)(B) only, the owner or operator may demonstrate that appropriate efforts to achieve compliance were or are being taken by means including, but not limited to, instituting a comprehensive program establishing a phased schedule of actions to be taken to bring the owner or operator into compliance with all such Tennessee environmental laws or with the federal, regional or local counterpart or extension of such laws.

(b) In a criminal proceeding, a court of record, after an in camera review and hearing consistent with the Tennessee Rules of Criminal Procedure, may require disclosure of material for which the privilege provided in this act is asserted, only if the court determines that disclosure of the environmental audit report was sought after the effective date of this act, and:

(1) The privilege is asserted for a fraudulent purpose; or

(2) Even if subject to the privilege provided in this act:

(A) the material shows evidence of noncompliance with Tennessee environmental laws, or with the federal, regional or local counterpart or extension of such laws, and

(B) the owner or operator of the facility has not promptly initiated appropriate actions to achieve compliance with such laws or to complete any necessary permit application; and

(C) as a result, the owner or operator of the facility did not or will not achieve compliance with the Tennessee environmental laws or the federal, regional or local counterpart or extension of such laws, or complete the necessary permit application within a reasonable amount of time.

For purposes of this subdivision (2)(B) only, the owner or operator may demonstrate that appropriate efforts to achieve compliance were or are being taken by means including, but not limited to, instituting a comprehensive program establishing a phased schedule of actions to be taken to bring the owner or operator into compliance with all such Tennessee environmental laws or the federal, regional or local counterpart or extension of such laws.

(c) If, based solely upon information obtained from a source independent of an environmental audit report, a district attorney general has probable cause to believe an offense has been committed under Tennessee criminal environmental laws or the regional or local counterpart or extension of such laws, the district attorney general may obtain an environmental audit report for which the privilege is asserted under this act pursuant to a search warrant, criminal subpoena or discovery as allowed by the Tennessee Rules of Criminal Procedure. The district attorney general shall not review or disclose the contents of the environmental audit report, but shall immediately place the report under seal with the appropriate court of record and provide written notice to the person authorizing the preparation of the report, whether owner or operator, that he has obtained the report and placed it under seal with the specified court of record. Within thirty (30) days of the owner's or operator's receipt of the written notice, the owner or operator or the district attorney general may file with the appropriate court of record, a petition requesting an in camera hearing on whether the environmental audit report or portions thereof are privileged or subject to disclosure. Failure by the owner or operator to timely file such petition shall waive the privilege, provided no such petition has then been timely filed by the district attorney general which had obtained said report. Failure by the district attorney general to provide the written notice specified in this section shall preclude the district attorney general from filing a petition under this section.

(d) Upon filing of such petition, the court shall issue an order scheduling an in camera hearing, within thirty (30) days of the filing of the petition, to determine whether the environmental audit report, or portions thereof, is privileged.

(e) The court may allow the report to be unsealed for the limited purpose of allowing the district attorney general to review the report and shall place appropriate limitations on distribution and review of the report to protect against unnecessary disclosure. The district attorney general may consult with enforcement agencies regarding the contents of the report as necessary to prepare for the in camera hearing. However, the information used in preparation

for the in camera hearing shall not be used in any investigation or in any proceeding against the defendant or any other person, and shall otherwise be kept confidential, unless and until such information is found by the court to be subject to disclosure.

(f) The parties may at any time stipulate to entry of an order determining that specific information contained in an environmental audit report is or is not subject to the privilege provided under this act.

(g) If the court should make a determination, following the in camera hearing, that the material is not privileged, the court shall compel the disclosure only of those portions of the environmental audit report relevant to issues in dispute in the proceeding. No evidence may be introduced of whatever form arising or derived from review of an environmental audit report following a determination by a court that such environmental audit report shall remain privileged.

(h) A party asserting the privilege provided in this act has the burden of proving that the materials claimed as privileged constitute an environmental audit report as defined in this act. A party seeking disclosure of the environmental audit or environmental audit report has the burden of proving the condition(s) for disclosure set forth. A district attorney general seeking disclosure under this section of this act has the burden of proving the conditions for disclosure set forth.

(i) A court of record that allows a party access to the environmental audit report under the provisions of this act shall limit such access to conditions necessary to protect the appropriate confidentiality of the report or any part of the report not required to be disclosed. A moving party who obtains access to any environmental audit report pursuant to this act shall not divulge any information from the report except as specifically allowed by the court.

(j) If any party divulges all or any part of the information contained in an environmental audit report in violation of this section or if any other person or entity knowingly divulges or disseminates all or any part of the information contained in an environmental audit report that was provided to such person or entity in violation of the provisions of subsections (a) or (b) of this section, such party, other person or entity is liable for any damages caused by the

divulgence or dissemination of the information that is incurred by the person or entity for which the environmental audit report was prepared.

SECTION 6. No person or entity participating in, conducting or preparing an environmental audit report or environmental audit may be examined as to the environmental audit or environmental audit report without the consent of the party authorizing the preparation of the report, whether owner or operator, or unless ordered to testify by a court of record. This section does not apply if the environmental audit as to which examination is sought is determined by a court of record to be subject to an exception allowing disclosure pursuant to the provisions of Sections 4 or 5 of this act. If ordered to testify by a court of record, the scope of examination shall only apply to those portions of the environmental audit or environmental audit report determined to be subject to disclosure. This section applies only to examinations made after the effective date of this act, and does not circumvent, limit, waive or abrogate the scope or nature of any other statutory or common law privilege or immunity that may otherwise exempt a person from examination.

SECTION 7. (a) If any owner, operator or his agent makes a voluntary disclosure of an environmental compliance violation to the Tennessee Department of Environment and Conservation, or to any other federal, state or local governmental agency, then there is a rebuttable presumption that the disclosure is voluntary, and the person or entity shall be immune from any state or local administrative and civil penalties associated with the issues disclosed and shall be immune from any state or local criminal penalties for acts associated with the issues disclosed unless said presumption is rebutted.

(b) For the purposes of this section, disclosure by an owner or operator or his agent to the Tennessee Department of Environment and Conservation, or any other state, or local governmental agency, regarding any information related to the compliance status of any of the owner or operator's facilities under Tennessee environmental laws or permits or under the

federal, regional or local counterpart or extension of such laws is voluntary if all of the following conditions are satisfied:

(1) The disclosure is not made in response to a final order issued to the owner or operator by the Tennessee Department of Environment and Conservation, or other appropriate state, federal or local governmental agency; and

(2) The disclosure arises out of an environmental audit; and

(3) The disclosure is made within thirty (30) days after knowledge of the information disclosed is obtained and promptly verified by the owner or operator; and

(4) The owner or operator making the disclosure initiates the appropriate effort to achieve compliance and corrects the noncompliance within two (2) years after the completion of the environmental audit. For the purposes of this subparagraph, upon application to and at the discretion of the Tennessee Department of Environment and Conservation, or other appropriate state or local governmental agency, the time period within which the noncompliance is required to be corrected may be extended if it is not practicable to correct the noncompliance within the two (2) year period. Where the noncompliance results from the failure to obtain a permit, appropriate efforts to correct the noncompliance may be demonstrated by the submittal of a complete permit application within a reasonable time. Review of a decision of the Tennessee Department of Environment and Conservation, or any other entity subject to the Tennessee Uniform Administrative Procedures Act, Tennessee Code Annotated § 4-5-101, et seq., adverse to the owner or operator as to the timeliness of a permit application or extension of corrective action beyond the two (2) year period under this subparagraph shall be made to the appropriate regulatory board and pursuant to said Uniform Administrative Procedures Act; and

(5) The person or entity making the disclosure cooperates with the Tennessee Department of Environment and Conservation, or other state, or local governmental agency, regarding investigation of the issues identified in the disclosure.

(c) To rebut the presumption that a disclosure is voluntary, the governmental entity shall show to the satisfaction of the administrative tribunal or court of record presiding over the enforcement action that the disclosure was not voluntary, based upon the factors set forth in subsection (b) of this section. A decision by an administrative tribunal regarding the voluntary nature of a disclosure is final agency action. No state or local governmental agency may include any administrative or civil penalty or fine or any criminal penalty or fine for acts in a notice of violation or in a cease and desist order based upon any environmental compliance violation immune from penalties under this section, absent a finding by the administrative tribunal or court of record that the state or local governmental agency has rebutted the presumption of voluntariness of the disclosure. The burden to rebut the presumption of voluntariness is on the state or local governmental agency.

SECTION 8. No state or local governmental agency or entity shall adopt any rule, regulation, guidance, policy or permit condition circumventing or limiting the privileges established by this act, or the exercise of said privileges, or the presumption and immunity established by this act.

SECTION 9. Nothing in this act is intended to, nor shall it circumvent, limit, waive or abrogate the scope or nature of any other statutory or common law privilege, including, but not limited to, the attorney work product privilege, the attorney-client privilege, the self-critical analysis privilege and the self-evaluation privilege.

SECTION 10. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions of applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 11. This act shall take effect upon becoming law, the public welfare requiring it.

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